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Dimerco Express (M) Sdn Bhd v Patricia Lee Siew Mei & Ors (Awot Global Logistics (M) Sdn Bhd, intervener)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-51–08 OF 2020
AZLAN SULAIMAN JC
7 AUGUST 2024

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Tort — Breach of confidence — Misappropriation of confidential information — Whether plaintiff had proven its case against defendants for breach of confidence, breach of fidelity, conspiracy to injure and unlawful interference with trade — Whether defendants' counterclaim against plaintiff for defaming them during execution of doorstep delivery order ('DDO') was unsustainable — Whether plaintiff had not committed trespass, detinue or interference with trade when it entered premises of new company where defendants worked to execute the DDO

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The defendants had been in the plaintiff's employ for many years before they resigned to take up managerial jobs with the intervener — the plaintiff's competitor in the transportation and logistics industry. The plaintiff alleged that before they resigned, the defendants had, without its knowledge or consent, downloaded into digital devices confidential information including

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trade secrets belonging to the plaintiff with a view to using such information in their new employment with the intervener. In this action, the plaintiff sought, inter alia, damages against the defendants for breach of confidence, breach of fidelity, conspiracy to injure and unlawful interference with its trade. Simultaneous with the filing of the instant action, the plaintiff obtained an ex

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parte Doorstep Delivery Order ('DDO') requiring the defendants upon receipt of the DDO, to immediately hand over to the plaintiff's supervising solicitor, any computers, laptops, notebooks, tablets, mobile phones and any other digital or optical storage devices (including cloud or email-based storage) in their possession, custody and/or power. On serving a copy of the DDO on the

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second and third defendants ('Annie' and 'Sheny') whilst they were at work at the intervener's office, the plaintiff's supervising solicitor received from them a laptop, a mobile phone and a hard disk that they each had in their possession, custody and/or power. The first defendant, who was not at the said premises at the time, handed over her mobile phone and laptop to the supervising solicitor

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the following day. All the said devices were returned to the defendants after data and information contained therein which allegedly belonged to the plaintiff were extracted by an IT forensics expert for use at the trial. The defendants counterclaimed for damages for defamation against the plaintiff, contending that the execution of the DDO had embarrassed the defendants in front of

their colleagues at the intervener's office. The intervener, on the other hand, sought general, aggravated, punitive and exemplary damages from the plaintiff for trespass, detinue and unlawful interference with its trade on the grounds that: (a) the DDO was irregular or invalid because it did not state the intervener's address or premises for execution of the DDO and failed to name the supervising solicitor who would be executing it; (b) the supervising solicitor had deceived the intervener's staff at the reception area to gain entry into its premises and had acted unreasonably and beyond his powers; and (c) two of the laptops that the supervising solicitor took possession of belonged to the intervener and by that act, the plaintiff had unlawfully accessed the intervener's proprietary and confidential information.

Held, allowing the plaintiff's claim, ordering general, aggravated and/or exemplary damages to be assessed, dismissing both the defendants' counterclaim and the intervener's claim against the plaintiff and granting other consequential reliefs sought by the plaintiff:

(1) On balance of probabilities, the plaintiff had proven its claims against the defendants. During the trial, the defendants had each admitted to deliberately accessing, downloading and retaining the plaintiff's confidential information. There was no need for them to take that information with them to the intervener's organisation and to continue having that information remaining in their devices over a year after they left the plaintiff's employ unless it was going to be, had been and was continuing to be used (see paras 38, 60 & 65).

(2) There was evidence that the defendants had clandestinely communicated with the intervener's representatives on setting up the intervener's office in Malaysia whilst the defendants were still in the plaintiff's employ. They had also testified that the laptops now belonged to the intervener. All of these circumstances strongly suggested a presumption of unauthorised use by the defendants and the intervener of the plaintiff's confidential information. In the face of that presumption, the burden of proving otherwise was on the defendants and the intervener. The plaintiff would not have known of or been privy to the use and extent of use of its confidential information by the defendants and the intervener. It was not sufficient for the witnesses to merely say that the plaintiff's confidential information was irrelevant or of no use to the intervener's business (see paras 39–40 & 49).

(3) The intervener could have, but did not, adduce evidence to show that its business was run on a wholly different footing from that of the plaintiff without the need to use the plaintiff's confidential information. There were, in fact, strong parallels and similarities between the plaintiff's confidential information and the multiple documents the intervener

adduced in several bundles that it alleged were extracted alongside the plaintiff's extracted documents (see para 42).

(4) The data and information extracted from the devices that were in the defendants' possession contained plenty of the plaintiff's confidential information. This showed that the plaintiff's application for the DDO was in pursuit of its genuine redress against the defendants for the claims it had against them. Even if the defendants felt that they were embarrassed in front of their colleagues at the intervener's office when the DDO was executed on them, that could not form the basis of any cause of action against the plaintiff as the DDO was granted by the court and the plaintiff had acted fully within its rights in executing the order. There was no basis for the defendants to claim that they were defamed by the plaintiff (see paras 68 & 70–75).

(5) It was not necessary for the DDO to have stated the intervener's address as the place of execution of the DDO. The DDO simply required the defendants immediately upon being served with the DDO, wherever they might be at the time, to deliver up the devices stated in the DDO to the supervising solicitor. It was only reasonable and logical that the DDO was executed where it was likely that the defendants would all be at the same time, namely, at their workplace at the intervener's premises (see para 82).

(6) It was not mandatory under O 29 r 1(2A) of the Rules of Court 2012 for the DDO to identify the supervising solicitor who would be executing the same. Even if it was true that the supervising solicitor in the instant case had allegedly deceptively informed the intervener's reception staff that he was there with agreements for the defendants to sign, that did not invalidate the DDO or make the solicitor's attendance at the intervener's inner premises unlawful or a trespass. The solicitor was not obliged to inform the intervener's reception staff about the DDO. In all the circumstances of the case, whatever the supervising solicitor did in the instant case to serve the DDO on Annie and Sheny and forthwith take possession of the digital devices from them (even though two of the laptops belonged to the intervener) was reasonable, acceptable and in compliance with the terms of the DDO. The intervener's claims for trespass, detinue and interference with trade were frivolous and had to be dismissed (see paras 86–87, 91–94, 101, 103, 110 & 118).

[Bahasa Malaysia summary

Defendan telah berkhidmat dengan plaintif selama bertahun-tahun sebelum mereka meletak jawatan untuk memegang jawatan pengurusan dengan pencelah — pesaing plaintif dalam industri pengangkutan dan logistik. Plaintif mendakwa bahawa sebelum mereka meletak jawatan, defendan telah, tanpa pengetahuan atau persetujuannya, memuat turun ke dalam peranti digital

maklumat sulit termasuk rahsia dagangan kepunyaan plaintif dengan tujuan untuk menggunakan maklumat tersebut dalam pekerjaan baharu mereka dengan pencelah. Dalam tindakan ini, plaintif menuntut, antara lain, ganti rugi terhadap defendan kerana pelanggaran kepercayaan, pelanggaran kesetiaan, konspirasi untuk merugikan dan campur tangan yang menyalahi undang-undang terhadap perdagangannya. Serentak dengan pemfailan tindakan semasa, plaintif memperoleh perintah ex parte *doorstep delivery order* ('DDO') yang memerlukan defendan setelah menerima DDO, segera menyerahkan kepada peguamcara penyelia plaintif, mana-mana komputer, laptop, komputer riba, tablet, telefon bimbit dan sebarang peranti storan digital atau optik lain (termasuk storan berasaskan awan atau emel) dalam milikan, jagaan dan/atau kuasa mereka. Semasa menyampaikan salinan DDO kepada defendan kedua dan ketiga ('Annie' dan 'Sheny') semasa mereka bekerja di pejabat pencelah, peguamcara penyelia plaintif menerima daripada mereka komputer riba, telefon bimbit dan cakera keras yang masing-masing berada dalam milikan, jagaan dan/atau kuasa mereka. Defendan pertama, yang tidak berada di premis tersebut ketika itu, menyerahkan telefon bimbit dan komputer ribanya kepada peguamcara penyelia pada hari berikutnya. Semua peranti tersebut dikembalikan kepada defendan selepas data dan maklumat yang terkandung di dalamnya yang didakwa milik plaintif telah diekstrak oleh pakar forensik IT untuk digunakan pada perbicaraan. Defendan menuntut balas ganti rugi untuk fitnah terhadap plaintif, dengan alasan bahawa pelaksanaan DDO telah memalukan defendan di hadapan rakan sekerja mereka di pejabat pencelah. Pencelah, sebaliknya, menuntut ganti rugi am, teruk, punitif dan teladan daripada plaintif untuk pencerobohan, penahanan dan campur tangan yang menyalahi undang-undang terhadap perdagangannya atas alasan bahawa: (a) DDO adalah tidak teratur atau tidak sah kerana ia tidak menyatakan alamat atau premis pencelah untuk pelaksanaan DDO dan gagal menamakan peguamcara penyelia yang akan melaksanakannya; (b) peguamcara penyelia telah memperdayakan kakitangan pencelah di kawasan penerimaan tetamu untuk masuk ke dalam premisnya dan telah bertindak secara tidak munasabah dan di luar kuasanya; dan (c) dua daripada komputer riba yang diambil alih oleh peguamcara penyelia adalah milik pencelah dan melalui perbuatan itu, plaintif telah mengakses maklumat hak milik dan sulit pencelah secara tidak sah.

Diputuskan, membenarkan tuntutan plaintif, memerintahkan ganti rugi am, teruk dan/atau teladan ditaksirkan, menolak tuntutan balas defendan dan tuntutan pencelah terhadap plaintif dan memberikan relif berbangkit lain yang diminta oleh plaintif:

(1) Berdasarkan imbangan kebarangkalian, plaintif telah membuktikan tuntutannya terhadap defendan. Semasa perbicaraan, defendan masing-masing mengaku sengaja mengakses, memuat turun dan menyimpan maklumat sulit plaintif. Tidak perlu bagi mereka untuk

membawa maklumat itu bersama mereka ke organisasi pencelah dan untuk terus menyimpan maklumat itu dalam peranti mereka lebih setahun selepas mereka meninggalkan pekerjaan plaintif melainkan ia akan, telah dan akan terus digunakan (lihat perenggan 38, 60 & 65).

(2) Terdapat keterangan bahawa defendan-defendan telah berkomunikasi secara rahsia dengan wakil-wakil pencelah mengenai penubuhan pejabat pencelah di Malaysia semasa defendan-defendan masih berada dalam pekerjaan plaintif. Mereka juga telah memberi keterangan bahawa komputer riba itu kini milik pencelah. Kesemua keadaan ini amat mencadangkan anggapan penggunaan tanpa kebenaran oleh defendan dan pencelah maklumat sulit plaintif. Dalam menghadapi anggapan itu, beban membuktikan sebaliknya terletak pada defendan dan pencelah. Plaintif tidak akan mengetahui atau maklum tentang penggunaan dan takat penggunaan maklumat sulitnya oleh defendan dan pencelah. Ia adalah tidak memadai untuk saksi-saksi hanya mengatakan bahawa maklumat sulit plaintif adalah tidak relevan atau tidak berguna kepada perniagaan pencelah (lihat perenggan 39–40 & 49).

(3) Pencelah boleh, tetapi tidak, mengemukakan keterangan untuk menunjukkan bahawa perniagaannya dijalankan di atas landasan yang sama sekali berbeza daripada plaintif tanpa perlu menggunakan maklumat sulit plaintif. Sebenarnya, terdapat persamaan yang ketara antara maklumat sulit plaintif dan pelbagai dokumen yang dikemukakan oleh pencelah dalam beberapa ikatan yang didakwa telah diekstrak bersama Dokumen yang diekstrak plaintif (lihat perenggan 42).

(4) Data dan maklumat yang diekstrak daripada peranti yang berada dalam simpanan defendan mengandungi banyak maklumat sulit plaintif. Ini menunjukkan bahawa permohonan plaintif untuk DDO bagi mengejar penyelesaian tulennya terhadap defendan untuk tuntutan yang dia ada terhadap mereka. Walaupun defendan merasakan bahawa mereka berasa malu di hadapan rakan sekerja mereka di pejabat pencelah apabila DDO dilaksanakan ke atas mereka, itu tidak boleh menjadi asas kepada sebarang kausa tindakan terhadap plaintif kerana DDO telah diberikan oleh mahkamah dan plaintif telah bertindak sepenuhnya mengikut haknya dalam melaksanakan perintah tersebut. Tiada asas untuk defendan mendakwa bahawa mereka telah difitnah oleh plaintif (lihat perenggan 68 & 70–75).

(5) Ia tidak perlu bagi DDO menyatakan alamat pencelah sebagai tempat pelaksanaan DDO. DDO hanya memerlukan defendan dengan segera setelah disampaikan dengan DDO, di mana sahaja mereka berada pada masa itu, untuk menyerahkan peranti yang dinyatakan dalam DDO kepada peguam penyelia. Ia adalah munasabah dan logik bahawa DDO telah dilaksanakan di mana kemungkinan defendan semua akan berada

pada masa yang sama, iaitu, di tempat kerja mereka di premis pencelah (lihat perenggan 82).

(6) Ia adalah tidak wajib di bawah A 29 k 1(2A) Kaedah-Kaedah Mahkamah 2012 bagi DDO untuk mengenal pasti peguamcara penyelia yang akan melaksanakan perkara yang sama. Walaupun benar bahawa peguamcara penyelia dalam kes semasa telah didakwa secara memperdaya memaklumkan kakitangan penerimaan pencelah bahawa dia berada di sana dengan perjanjian untuk ditandatangani oleh defendan, yang tidak membatalkan DDO atau menjadikan kehadiran peguam di premis dalaman pencelah menyalahi undang-undang atau pencerobohan. Peguamcara tidak diwajibkan untuk memaklumkan kakitangan penerimaan pencelah tentang DDO. Dalam semua keadaan kes itu, apa sahaja yang dilakukan oleh peguamcara penyelia dalam kes semasa untuk menyampaikan DDO kepada Annie dan Sheny dan dengan serta-merta mengambil alih peranti digital daripada mereka (walaupun dua daripada komputer riba itu milik pencelah) adalah munasabah, boleh diterima dan mematuhi syarat-syarat DDO. Tuntutan pencelah untuk pencerobohan, penahanan dan campur tangan dengan perdagangan adalah remeh dan terpaksa ditolak (lihat perenggan 86–87, 91–94, 101, 103, 110 & 118).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

CF Partners (UK) LLP v Barclays Bank Plc and another [2014] EWHC 3049 (Ch), Ch D (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41 (refd)

Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422; [1998] 3 CLJ Supp 196, HC (folld)

H & R Johnson (Malaysia) Bhd v H &R Johnson Tiles Limited & Anor [1995] MLJU 54; [1995] 2 CLJ 581, HC (refd)

I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others [2020] 1 SLR 1130, CA (refd)

Karen Yap Chew Ling v Binary Group Services Bhd and another appeal [2023] 4 MLJ 792, CA (refd)

Ly Furniture Sdn Bhd & Anor v Lifestyle Enterprise, Inc & Anor and another appeal [2015] MLJU 2347, CA (refd)

Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors [2017] MLJU 1187, HC (refd)

QB Net Co Ltd v Earnson Management (S) Pte Ltd and others [2007] 1 SLR 1; [2006] SGHC 183, HC (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
Schmidt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632, HC (folld)
Seager v Copydex, Ltd [1967] 2 All ER 415, CA (refd)
SkyWorld Development Sdn Bhd & Anor v SkyWorld Holdings Sdn Bhd & Ors [2020] 3 MLJ 294, CA (refd)
Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling [2008] 7 MLJ 903, HC (folld)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549, SC (refd)
Wong Kar Juat & Anor v S7 Auto Parts (M) Sdn Bhd [2016] 5 MLJ 527, CA (refd)
Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (folld)
YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd & Anor [2022] 6 MLJ 1, FC (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810; [2016] 2 CLJ 414, CA (refd)
Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals [2016] 5 MLJ 91, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Rules of Court 2012 O 18 r 7, 7(1), O 29 r 1(2A)

Chew Kerk Ying (with Raymond Tan) (Messrs Wong & Partners) for the plaintiff.
Mohan Ramakrishnan (Ramakrishnan & Assoc) for the defendants.
Vijay Ruben Kannan (Surend Mokhzani & Partners) for the intervener.

Azlan Sulaiman JC:

INTRODUCTION

[1] The plaintiff is a part of the Dimerco Group of Companies based in Taiwan formed in or around 1971 that specialises in providing transportation and logistics services globally to its customers all around the world. Dimerco extended its operations to the Malaysian market in or around 1984.

[2] The three defendants (respectively, 'Patricia', 'Annie' and 'Sheny', and collectively 'defendants') between them had been employed by the plaintiff for 48 years, until sometime in 2019 when they each resigned and soon after that joined the intervener, a member of the plaintiff's competitors in transportation and logistics services, who had in May 2019 just set up shop in Malaysia through the intervener.

[3] This judgment contains the courts decision on the following causes of action between the parties:

(a) an action for breach of confidence, breach of duty of fidelity, conspiracy to injure, and unlawful interference with trade, by the plaintiff against the defendants;

(b) a counterclaim by the defendants against the plaintiff for damages for defamation; and

(c) an action by the intervener against the plaintiff for trespass, detinue, and unlawful interference with trade.

SALIENT FACTS

[4] Table A below sets out brief details of the defendants' respective periods of employment with the plaintiff and their last positions:

Table A

Name	Period of employment	Last position held
Patricia	13 April 2009–29 June 2019	Regional Project Manager
Annie	1 April 1993–26 August 2019	Senior Air Freight Manager
Sheny	1 January 2007–23 August 2019	Key Account Manager

[5] This is to be compared with the managerial positions they each took up with intervener when they joined it immediately or soon after leaving the plaintiff's employ, as shown in Table B below:

Table B

Name	Last position held	Position in intervener
Patricia	Regional Project Manager	Regional Sales and Marketing Manager
Annie	Senior Air Freight Manager	Country Manager
Sheny	Key Accounts Manager	Air Freight Manager

[6] During the course of their employment with the plaintiff, the defendants and each of them were granted access to what the plaintiff calls its confidential information and trade secrets (collectively, 'plaintiff's confidential information').

[7] The plaintiff alleges that the defendants had wrongly accessed and downloaded the plaintiff's confidential information without its consent, and

had wrongfully removed and retained them for use after their employment with plaintiff in their new role as employees of the intervener:

(a) the plaintiff alleges that, after submitting her resignation on 3 June 2019, between that date and 27 June 2019, Patricia had accessed and downloaded some of the plaintiff's confidential information;

(b) the plaintiff alleges that, on 10 April 2019, Annie had wrongfully and unlawfully granted Sheny access to the plaintiff's confidential information relating to ocean freight even though it was irrelevant to Sheny's role at the time as Key Account Manager in the plaintiff's Air Freight Customer Service Department; and

(c) the plaintiff alleges that, after submitting her resignation on 5 August 2019, between that date and 16 August 2019, Sheny had accessed and downloaded some of the plaintiff's confidential information.

[8] The plaintiff alleges that these acts, and the use of the plaintiff's confidential information in the course of their subsequent employment with the intervener, amount to breach of confidence, breach of duty of fidelity, conspiracy to injure, and unlawful interference with trade by the defendants

[9] Upon filing this action on 19 August 2020, the plaintiff simultaneously applied for and on 1 September 2020 this court granted an ex parte order ('DDO') for injunctive relief against the defendants in the form of an order, inter alia, for the delivery-up of any computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device in their possession, custody and/or power to supervising solicitor(s), and protective orders/directions ('the order'). Given that the order lies at the heart of all of the actions, it is only proper that their terms be set out in toto, below:

A. DELIVERY-UP/INJUNCTIVE RELIEF

1. An Order to compel the defendants and each of them, whether acting by themselves or through their partners, employees, set vat its, agents, contractors, associated companies or otherwise howsoever, to deliver up to the supervising solicitors ('Supervising Solicitor' or 'Supervising Solicitors') immediately upon service of this Order, any computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device (including any cloud or email based storage) in the possession, custody and/or power of the defendants and each of them, without turning on or off, accessing, altering, destroying, removing, transferring, or otherwise tampering with such device subsequent to the service of this Order, for the purpose of:-

(a) search and/or seizure for evidence of confidential and proprietary information and/or trade secrets of the plaintiff and any material which may be used as evidence in this action as set out in Schedule A attached hereto (the 'Confidential Information');

(b) imaging of the same to preserve data integrity, which includes:-

(i) carrying out data recovery of deleted information or documents (if necessary by means of, inter alia, temporarily removing the storage disc/drive or hard disk/drive of the host device/computer/server); and/or

(ii) making digital copies of the contents of any device (including desktops, laptops and mobile phones), any form of removable or mobile media storage (including floppy disks, zip disks, flash disks, CD-ROMs, USD external hard drives and USB flash drives), cloud repositories (including cloud and e-mail accounts), computer servers (including rack mounted and tower servers) ('Digital Copies') (if necessary by means of, inter alia, temporarily removing the storage disc/drive or hard disk/drive of the host device/comput&r/server) and maintain the Digital Copies in a secure location to be determined by the Supervising Solicitors;

(c) conducting searches, reviews, extraction and/or to make copies of the contents of the Digital Copies by, inter alia, the following means:-

(i) the carrying out or running of selective searches using search terms to locate the Confidential Information;

(ii) the extraction of all Confidential Information;

(iii) *the processing of all Confidential Information;*

(iv) the digital copying of the Confidential Information;

(v) the hosting of all the Confidential Information on a secure document review platform; and/or

(vi) removing, retaining and/or delivering into the custody of the plaintiffs solicitors the Confidential Information (or copies thereof) for carrying into effect the purposes of this Order.
(the 'Search Process').

2. For the purposes of Order (1) above, that the defendants and each of them must immediately upon service of this Order, hand over to the Supervising Solicitors and/or its authorised representative(s) effective access to the above devices, including but not limited to doing the following:-

(a) to open and provide keys to locks;

(b) to provide all keys and passwords to extract, recover, decode and decrypt data; and

(c) to provide any other form of identification codes, passwords, passphrases, or any other such information or knowledge necessary for searching, downloading, extracting and making copies of the devices.

3. An injunction to restrain the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, until trial of this action or further Order, from using, disclosing or

A utilising in any way, any or all of the Confidential Information as set out in Schedule A attached hereto for any purpose or otherwise exploit the same without the plaintiffs consent;

4. An Order to compel the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, to deliver up to the supervising solicitor(s) and/or its authorised representative(s) immediately upon service of this Order, all documents and/or materials, including but not limited to those relating to the Confidential Information as set out in Schedule A attached hereto, in the possession, power, custody of the defendants or either of them;

C 5. That the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, do within 24 hours of the service of the order upon them, deliver or cause to be delivered, to the custody of the Supervising Solicitors, ail devices, documents and/or material (save insofar as they have not already been delivered-up pursuant to this Order) required to be D delivered-up under this Order;

6. That the original devices, documents, and/or materials delivered-up are to remain in the custody of the Supervising Solicitors until the completion of the Search Process, or further Order or direction of this Honourable Court;

E 7. The plaintiffs solicitors are to file a report to the Court on the above process;

8. That the defendants and each of them, within a period of 48 hours upon service of this Order, do respectively swear and forthwith serve Affidavit(s) upon the plaintiffs solicitors to:-

F (a) confirm that all the devices, documents and/or materials required to be delivered-up under this Order have been so delivered-up, and if not, their whereabouts or what has happened to the same; and

(b) set out the name and addresses of all the persons (including any individuals, firms or companies) to whom the defendants have used, supplied, offered to supply, or otherwise howsoever delivered, the G Confidential Information or any part thereof;

9. That leave of Court be granted to the plaintiff to use the documents, materials, and/or evidence (including the Digital Copies) obtained through the execution of this Order in these proceedings or any other proceedings relating to the subject matter of the plaintiffs claims herein, as is reasonably requited to assert and/or H enforce the plaintiffs rights.

10. That the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, be restrained from directly or indirectly informing or notifying otherwise than for the purpose of seeking legal advice from their lawyers, any person, company or firm of the existence I of these proceedings or otherwise warn any person, company or firm that proceedings have been brought against them by the plaintiff;

B. PROTECTIVE ORDERS /DIRECTIONS

11. That in respect of the conduct and/or disposal of the Application:-

(a) the Affidavits in respect of this Application are to be filed manually and need not be filed through electronic filing;

(b) the Affidavits in respect of this Application be segregated from other documents which have been filed or submitted to Court and be sealed with the following note, which shall be clearly visible:-

'CONFIDENTIAL AND PROTECTED INFORMATION

Pursuant to the Order or Direction of Court given on [date] governing the preservation of confidentiality and protection of confidential documents and information, this package shall remain sealed in the Court files and is neither to be opened nor the contents thereof be accessed, displayed, disclosed or revealed except in accordance with the terms of the Order or Direction and permitted by the Court.'

(c) That the Affidavits in respect of this Application shall be kept confidential by the parties and be used solely for the purpose of these proceedings, and are not to be made accessible or available for public inspection by any person; and/or

(d) Further or alternatively, that the plaintiff be given leave of Court to redact the exhibits in its Affidavits in respect of this Application insofar as the same contains Confidential Information.

B. MISCELLANEOUS

12. The defendants notified of this Order may jointly or separately apply to the Court to vary or discharge it or so much of it as affects that person, but anyone wishing to do so must give to the plaintiffs solicitors 48 hours' prior written notice before making any such application to the Court.

13. All parties concerned with this Order shall be at liberty to apply to the Court.

14. The costs of and incidental to this application, including all incidentals incurred as a result of this Order, be costs in the cause; and

15. Such further and/or other relief as deemed fit by this Honourable Court.

Dated this 19 August 2020.

Senior Assistant Registrar

High Court

Kuala Lumpur

[10] The order was executed against the defendants by the supervising solicitor appointed by the plaintiff, one Gerald Peter Samuel ('supervising solicitor'), a senior member of the Malaysian Bar. He served a copy of the order on Annie and Sheny on 9 September 2020 while they were at work at the intervener's office, and they each delivered up to him a laptop, a mobile phone and subsequently a hard-disk they each had in the possession, custody and/or power (collectively, 'the devices') to him. Patricia, who was not at the intervener's office premises at the time, voluntarily attended at the supervising

A solicitors office the next day and delivered-up her mobile phone and laptop.

[11] These devices and the information and data within them were then dealt with in the following manner:

B (a) in the presence of the supervising solicitor, a third-party IT forensic expert imaged/copied/downloaded all of the data and information contained in the devices into a secondary storage device ('storage device');

(b) the devices were then returned to the defendants;

C (c) the plaintiff and the defendants (through their solicitors) agreed on the specific search terms and parameters to extract the documents belonging to the plaintiff from the storage device; and

(d) the documents extracted from the storage device based on those specific search terms and parameters were saved into two separate thumb-drives with one each given to the solicitors for the plaintiff and the defendants respectively.

D

[12] From that process, multiple documents belonging to the plaintiff were E extracted, and were adduced at the trial in multiple bundles (collectively, 'plaintiffs' extracted documents').

[13] On 21 January 2021, the intervener obtained leave from this court to intervene into this action.

F

[14] On 5 January 2022 by which time the extraction process had long been completed, this court made an order inter partes only in respect of restraining the defendants from using, disclosing or utilising in any way, any or all of the plaintiff's extracted documents/confidential information.

G

[15] Crucially, the defendants and the intervener did not ever apply to set aside the ex parte DDO. Nor did they appeal against that inter partes order made on 5 January 2022.

H THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANTS

Breach of confidence

[16] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, Megarry J set out I the three elements for establishing breach of confidence, when he said:

> In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in the Saltman case on page 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in

circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

[17] In *Seager v Copydex, Ltd* [1967] 2 All ER 415, Lord Denning MR said:

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent The principle is clear enough when the whole of the information is private.

[18] In Schedule A to its statement of claim, the plaintiff had expressly pleaded what it regarded as its confidential information. The list of items in Schedule A are reproduced below:

SCHEDULE A

a) Customer lists, sales, non-public marketing and promotional information;

b) Customer freight volume and frequency;

c) Business plans and forecasts;

d) Accounting and tax records, correspondence, orders, and inquiries;

e) Non-public financial information in relation to earnings, expenses and investments; pricing information; vendor or supplier lists; customer data; business development materials; costs of third party service providers; costs of third party storage providers; personnel files; company policies, manuals, guidelines, procedures and SOPs; information and/or documents created and/or prepared by and for and/or on behalf of Dimerco for purposes of its business;

f) Any document marked confidential, internal use only, proprietary, or by such other means as to indicate the intent is that the document is confidential to Dimerco; and

g) Business intelligence of Dimerco, including market research in relation to the industry.

[19] In its written submissions, the plaintiff had categorised the plaintiffs extracted documents as follows, which categorisation I find to be valid and reasonable, more so in the absence of any objection or submissions by the defendants to the contrary:

(a) operating budget and profit and loss records;

(b) customer list and data;

(c) quotes, rates and/or charges; and

A (d) business reports and analysis,

[20] The cases relied on by the plaintiff do indeed show that these documents and information are confidential. In *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297, Abdul Malim Ishak recognised B that information relating to customers, cost prices together with the specific needs and requirements of customers are confidential in nature.

[21] In *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632, C Kamalanathan Ratnam JC said:

> It is my judgment that trade secrets are not limited to manufacturing process or secret formulae but extend to information relating to the list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing D negotiation with the customers ...

[22] In the case of *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422; [1998] 3 CLJ Supp 196, Kamalanathan Ratnam JC said marketing information, pricing, sales information, technical information E relating to the plaintiff's operating system and costs are confidential in nature.

[23] In *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903, Vincent Ng said:

> F The law of confidentiality in the context of relationship between employer and employee, and of restrictive covenants has been set out in Faccenda Chicken as follows:
>
> (1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer: cf *Vokes Ltd v Heather* (1945) 62 RPC G 135 at p 141.
>
> (2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.
>
> H (3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purpose of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary I according to the nature of the contract (see *Vokes Ltd v Heather*); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer (see

Robb v Green [1895] 2 QB 315; [1895] All ER Rep 1053 and *Wessex Dairies Ltd v Smith* [1935] 2 KB 8.; [1935] All ER Rep 75).

(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (see *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239, or designs or special methods of construction (see *Reid Sigrist Ltd v Moss Mechanism* (1932) 49 RFC 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.

(5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid, (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally, (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine. The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained unless it can be regarded as a trade secret or the equivalent of a trade secret: see for example *Herbert Morris Ltd v Saxeiby* [1916] 1 AC 688 at 710; [1916-17] All ER Rep 305 *at p 317 per Lord Parker and Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at p 1037; [1977] 1 WLR 1472 at p 1484 per Megaw LJ.

[24] Applying these cases, I find that the plaintiff's extracted information does have the necessary quality of confidence about it. This is all the more so when the intervener had classified its own information and documents under those same or similar categories as confidential. What the intervener regards as confidential must surely apply to the same types of information belonging to the plaintiff. To suggest otherwise would be inconsistent and smack of double standards.

[25] I would further find that that plaintiff's extracted information must have been imparted by the plaintiff to the defendants in circumstances importing an obligation of confidence. They were each holding senior managerial positions relating to essential facets of the plaintiff's business. From

their many years of service, they must certainly have known, appreciated and realised that the information that each were given and given access too was due to their respective positions and functions as employees of the plaintiff and that that information was confidential to the plaintiff.

[26] Closely aligned to this is the fact that their respective contracts of employment and the non-disclosure and security agreements they each signed expressly provided for office secrecy and confidentiality. The former provided:

> Office Secrecy
>
> All information obtained in the course of work with this Company shall be deemed to be strictly confidential. No such information shall be divulged to any outside party.

[27] The non-disclosure and security agreements provided:

> Confidential Information
>
> At all times, both during and after my employment with Dimerco, I will not use (except for the benefit of Dimerco at Dimerco's discretion) and will hold in confidence and not disclose (without Dimerco's written authorisation) any proprietary or trade secret information of Dimerco, until such information becomes generally and rightfully known outside Dimerco without non-disclosure restriction, or for the maximum period of time for maintaining trade secrets as permitted by law in the state / country in which I am employed if such period is shorter.
>
> I agree not to make unauthorised copies of such confidential information and to return to Dimerco immediately upon my termination or upon Dimerco's request, all tangible forms of such confidential information, including but not limited to computerised data or programs, specifications, documents, business plan, customers' information, financial information, personnel information, or any other Dimerco's confidential information.

[28] In this regard, I also reject the defendants' allegations that that information was not confidential as others within the plaintiff's organisation had access to it. Exclusive access to that information is not the benchmark for information being regarded as confidential; it is in the confidentiality of that information and in the manner of imparting of that information by the plaintiff to them which is crucial.

[29] Furthermore, the defendants admitted in cross-examination that access to that information is only given on an access-needed basis, ie to those who need that access to perform their tasks and job functions. This negates their pleaded stand that access to that information is freely available to all of the plaintiff's employees.

[30] I would further reject their contention that that information was not confidential as none of them bore the markings of confidentiality in that they were not marked 'confidential' or words to that effect. I would reject this argument as it is in the confidential nature of the documents and the confidentiality in imparting of that information by the plaintiff to them which is crucial, not whether the documents or information are specifically so marked. Likewise, simply because a document is marked confidential does not by that marking alone render it so.

[31] In *QB Net Co Ltd v Earnson Management (S) Pte Ltd and others* [2007] 1 SLR 1; [2006] SGHC 183, Lai Siu Chiu J said:

> I shall first make a preliminary observation. One of the arguments put forth by the second defendant was that the Documents, which he had been given access to, were not marked as 'confidential'. The second defendant sought to rely on this as a factor which negated the confidential nature of the Documents.
>
> This is logically flawed — the issue of confidentiality is to be ascertained by reference to the substance of the information for which protection is sought Thus, the mere fact that a document has been labelled 'confidential' will not automatically confer confidentiality on it if it has been made generally available: *In the Matter of JR Dairymple's Application for a Patent* [1957] RPC 449. Conversely, the mere failure to label a document 'confidential' should not detract from its confidential nature (if it is indeed the case).

[32] In *CF Partners (UK) LLP v Barclays Bank Plc and another* [2014] EWHC 3049 (Ch), Hildyard J said (in paras 19–134 of his judgment):

> Duty of confidence: law and equity
>
> 119. The legal principles defining the duty of confidence are well established and there was a large measure of common ground both as to their content and as to their application.
>
> 120. Even in the absence of a contractual relationship and stipulation, and in the absence too of an initial confidential relationship, the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential: see per Lord Nichoils (dissenting on the result, but not on this issue) in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [14].
>
> 121. The subject matter must be 'information', and that information must be clear and identifiable: see *Amway Corp v Eurway International Ltd* (1974) RPC 82 at 86–87.
>
> 122. To warrant equitable protection, the information must have the 'necessary quality of confidence about if: per Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.
>
> 123. Confidentiality does not attach to trivial or useless information: but the measure is not its commercial value; it is whether the preservation of its confidentiality is of substantial concern to the claimant, and the threshold in this

regard is not a high one: *Force India Formula One Team Limited* [2012] ROC 29 at [223] in Arnold J's judgment at first instance.

124. The basic attribute or quality which must be shown to attach to the information for it to be treated as confidential is inaccessibility: the information cannot be treated as confidential if it is common knowledge or generally accessible and in the public domain. Whether the information is so generally accessible is a question of degree depending on the particular case. It is not necessary for a claimant to show that no one else knew of or had access to the information.

125. A special collation and presentation of information, the individual components of which are not of themselves or individually confidential, may have the quality of confidence: for example, a customer list may be composed of particular names all of which are publicly available, but the list will nevertheless be confidential, in the *Saltman case* Lord Greene MR said:

> ... it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

Or as it is put in *Gurry on Breach of Confidence* (2nd ed., 2012) para 5.16:

> Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the skill and ingenuity of the human brain. Novelty depends on the thing itself and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components ...

126. Further, and of particular potential relevance in this case, pieces of information which individually might appear to have limited value and marginal secrecy, in combination in particular hands, might have special composite value and confer on the recipient a considerable advantage: as was noted by the New Zealand Court of Appeal in the Arklow case when at that stage (see [1998] 3 NZLR 680 at 700 in the judgment of the majority which was affirmed by the Privy Council).

127. The parties may by contract agree and identify specified information that is, or is as between the parties to be treated as, confidential, or protected under the terms of their agreement; or they may simply agree that information may not be used whether or not otherwise it would have the quality of confidentiality.

128. Thus, in *Ministry of Defence v Griffin* [2008] EWHC 1542 Eady J observed:

> A contract may embrace categories of information within the protection of confidentiality even if, without a contract, equity would not recognise such a duty.

129. However, that case concerned obligations to Government of a sensitive nature: and an attempt to restrain the use of information that is not confidential (e.g.

because in the public domain) may risk being unenforceable on grounds of public policy as being in restraint of trade. Further, loss and damage might be impossible to establish.

130. Contractual obligations and equitable duties may co-exist: the one does not necessarily trump, exclude or extinguish the other' see *Robb v Green* [1895] 2 QB 31 *Sand Nichrotherm Electrical Company Ltd and others v Percy* [1957] RPC 207 (both in the Court of Appeal).

131. However, where the parties have specified the information to be treated as confidential and/or the extent and duration of the obligations in respect of it, the court will not ordinarily superimpose additional or more extensive equitable obligations: and see per Sales J in *Vercoe and Pratt v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), who found in that case that the duty of confidence was confirmed and defined by the contract, and observed (at [329]):

> Where parties to a contract have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence: see eg *Coco v Clark* at 419.

132. Nevertheless, that does not preclude wider equitable duties of confidence in circumstances that are not ordinary. For example, as it seems to me, a circumstance could arise where the obligations of the parties in respect of information with the quality of confidentiality are not clearly prescribed or governed by the contractual terms but where the use of certain information would plainly excite and offend a reasonable man's conscience. In such circumstances, as it seems to me, an equitable duty not to use the information having that quality would be recognised, even if that went further than the definition, duration or restraint prescribed by the contract

133. Put another way, whilst it will not usually be unconscionable to use information in conformity with, or in a manner that does not offend, the terms consensuaily agreed, and the contract will shape the commitment, contract does not necessarily assuage conscience, and equity may yet give force to conscience: see per Simon Brown LJ (as he then was) in *R v Department of Health, Ex p Source Informatics Ltd* [2001] QB 424 at [31]; see also the emphasis on conscience as being the basis of both the duty and any action for its enforcement or vindication per Lord Neuberger of Abbotsbury PSC in *Vestergaard Fraudsen A/S v Bestnet Europe Ltd and others* [2013] UKSC 31; [2013] 1 WLR 1556.

134. Furthermore, and again by reference to the roots of the equitable duty in conscience, it seems to me that there may be equitable reasons for declining to regard the equitable obligation as confined by a contractual restriction. An example might be if it is shown that the restriction relied on by one party as confining its equitable obligations was agreed by the other party in ignorance of a fact which, had it been disclosed, would either have caused that other party to withdraw altogether or insist upon the removal, or at least fundamental recasting, of the restriction. (I return to this aspect when considering whether in this case Barclays was in a position of conflict which it failed to disclose when the IVC/Barclays Confidentiality Agreement was made: see especially paras 417 to 467 below.)

[33] I would also reject the defendants' submission that the non-disclosure and security agreements should be disregarded by this court on the basis that the plaintiff did not expressly plead them in its statement of claim. O 18 r 7(1) of the Rules of Court 2012 expressly provides:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

[34] In *YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd & Anor* [2022] 6 MLJ 1, Azahar Mohamed CJ (Malays) said of O 18 r 7(1):

> This rule lays down the requirements of the pleading, namely that pleadings should be statements in summary form, stating only the material facts in a manner which is brief and to the point, and not the evidence by which they are to be proved ...

[35] In paras 17, 23, and 29 of the statement of claim, the plaintiff had similarly pleaded against all three defendants that they each owed to it:

> ... various express and implied duties and obligations to Dimerco Malaysia arising from, inter alia, her employment relationship with Dimerco Malaysia, including but not limited to the following:-
>
> a) a duty so long as the contract of employment subsisted not to misuse any of the Confidential Information, or to otherwise disclose the Confidential Information to any third party;
>
> b) a duty, following the termination of the contract ot employment, not to retain, use, exploit, or otherwise disclose any trade secrets or Confidential Information to any third party; and
>
> c) in any event, a duty not to misuse, access, or otherwise howsoever acquire Confidential Information without Dimerco Malaysia's knowledge, consent and/or approval.

[36] Further, in para 6 of its reply, the plaintiff had expressly pleaded:

> In reply to the defendants' allegation that the Confidential Information is not confidential because it is available to all of Dimerco Malaysia's employees (which is denied), Dimerco Malaysia avers that the same is unsustainable in fact and/or in law. *AH employees of Dimerco Malaysia who have access to the Confidential Information are under obligations of confidence to Dimerco Malaysia in relation thereto, as are the defendants.* (Emphasis added.)

[37] In my view, the non-disclosure and security agreements are evidence of that expressly pleaded case and therefore need not have been expressly and specifically pleaded.

[38] Finally, I would find that, on the balance of probabilities, there was unauthorised use of that information to the detriment of the plaintiff. Prior to leaving the plaintiff's employ, all three defendants were stalwarts within the plaintiff's organisation, and all three left to join the intervener. In cross-examination they had each admitted to deliberately accessing, downloading and retaining the plaintiff's confidential information. I also find that there would have been no need for them to take that information with them to the intervener's organisation and continue having that information remaining in the devices over a year after they had left the plaintiff's employ, unless it was going to be, had been and was continuing to be used.

[39] Further, there was evidence of communications between them and the intervener's representatives on setting up the intervener's office in Malaysia while they were still in the plaintiff's employ. They had also testified that the laptops now the belonged to the interveners. In my view, all of these circumstances alone strongly suggest a presumption of unauthorised use by the defendants and the intervener of that information.

[40] In the face of that presumption, in my view the burden of proving otherwise would have been the defendants' and the intervener's. The plaintiff would not have known or been privy to the knowledge of use and the extent of the use of the plaintiffs confidential information and the extent of its use by the defendants and the intervener. It is not sufficient for their witnesses to merely say that that plaintiffs confidential information was irrelevant or of no use to the intervener's business.

[41] In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130, Sundaresh Menon CJ said (in paras 61 and 62 of the judgment of the Singapore Court of Appeal):

> 61 ... Upon the satisfaction of these prerequisites [the first 2 requirements in *Coco*], an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it.
>
> Whatever the explanation, the burden will be on the defendant to prove that its conscience was unaffected. In our view, this modified approach places greater focus on the wrongful loss interest without undermining the protection of the wrongful profit interest.
>
> 62. A shift in the burden of proof also addresses the practical difficulties faced by owners of confidential information in bringing a claim in confidence ... defendants are comparatively better positioned to account for their suspected wrongdoing.

[42] The intervener could have but did not adduce any evidence that shows that their own business was run on a wholly different footing to the plaintiffs without the need to the plaintiff's confidential information. In fact, there were

strong parallels and similarities between the plaintiffs confidential information and the multiple documents the intervener adduced in several bundles that it alleged were extracted alongside the plaintiffs extracted documents.

[43] I therefore find that the plaintiff has successfully proved its action against the defendants for breach of confidentiality.

Breach of fidelity

[44] In its written submissions, the plaintiff cited three decisions of the Court of Appeal in support of this action.

[45] Firstly, in *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91, Abang Iskandar JCA (now PCA) said:

> Under the law, an employee of a company has a duty of fidelity to be observed at all times during his employment with the company. What is this duty of fidelity? Every employment contract contains an implied term that an employee will serve his employer with good faith and fidelity (the duty of fidelity). The duty of fidelity is owed by all employees and is to be distinguished from a fiduciary duty. A fiduciary duty requires an employee to act in the interests of his employer, whereas the duty of fidelity Inherent in that duty to have regard to his employer's interests must be a duty not to act in a manner which would be to disregard his employer's interests. Such acts must include acts that are inherently detrimental to his company's interests.

[46] Then, in *Wong Kar Juat & Anor v S7 Auto Parts (M) Sdn Bhd* [2016] 5 MLJ 527, Idrus Harun JCA said:

> We wish to express our understanding of the law. We apprehend that as regards a breach of trust and breach of fiduciary duty in the context of an employee and employer relationship, where the employee's contract involves receipt of the employer's property, notwithstanding whether the property consists of tangible assets or confidential information, a fiduciary obligation exists (see *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268. This obligation would in our view concern with the employee's duty to look after the employer's interest, the duty of fidelity towards the principal and the duty to act in good faith, not to make a profit out of the trust, not to place himself in a position where his duty and his interest may conflict and not to act for his own benefit or for the benefit of a third person without the informed consent of his principal. Who is a fiduciary in taw is defined by Millett LJ in *Bristol and West Building Society v Mathew* [1998] Ch 1 at p 11 as follows:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.

[47] Thirdly, recently in *Karen Yap Chew Ling v Binary Group Services Bhd and another appeal* [2023] 4 MLJ 792, Lee Swee Seng JCA said:

> Moreover, the defendant Karen Yap was also a fiduciary and owed fiduciary duties to the plaintiff. In her position as the Head of Marketing, she was also entrusted with the custody of the Apricorn Disk representing the data bank of the plaintiff updated on a daily basis containing confidential information. It goes without saying that she knows that she was not to breach the plaintiff's confidence reposed with her especially when she was leaving for Spectre.ai, a direct competitor of Binary.com. In transgressing the trust reposed on her by the plaintiff, she had transferred the whole treasure trove of confidential information to herself by making copies of it and then sought to cover any trail of such clandestine copying.
>
> We need not go further and farther than the observation of Millet LJ in *Bristol and West Building Society v. Mothew (t/a Stapley & Co)* [1998] Ch 1 at p 11 who is a fiduciary as follows:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets, A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[48] I find that the factors resulting in my finding of breach of confidentiality by the defendants that I enunciated earlier are also applicable to the plaintiff's action for breach of fidelity.

[49] I further find to be credible the evidence that Patricia and Annie were actively involved in the setting up of the intervener's office at a time when they were still employed by the plaintiff, and that Sheny had been kept abreast of that by Annie. That they had clandestinely communicated with the intervener's representatives through their own personal g-mail accounts suggests that they did so to avoid detection.

[50] Based on the foregoing, I find that the plaintiff has successfully proved its action against the defendants for breach of fidelity.

Conspiracy to injure

[51] In *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810; [2016] 2 CLJ 414, the Court of Appeal identified the

following four ingredients of conspiracy to injure that a plaintiff must plead and prove:

(a) a combination or agreement between two or more individuals;

(b) an intent to injure;

(c) pursuant to which combination or agreement and with that intention certain acts were carried out; and

(d) resulting in loss and damage to the plaintiffs.

[52] In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, the Court of Appeal set out the four ingredients for proving the tort of conspiracy to injure. They are:

(a) an agreement between two or more persons;

(b) the agreement is for the purpose of injuring another;

(c) acts done in execution of that agreement resulted in damage to the other;

(d) damage resulted.

[53] In respect of an agreement between two or more persons, in *Renault SA*, KN Segara JCA said (in para 33 of the judgment):

> It is clear that the very first element to he shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar wiil have to make for the Kangoo project.

[54] In *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187, Wong Kian Kheong JC (now JCA) held, inter alia, that such an agreement or combination may be and may be in writing or by word of mouth.

[55] On the evidence, I find that on the balance of probabilities that the plaintiff has established the tort of conspiracy to injure as against the defendants:

(a) they had all decided to leave the plaintiff's employ at around the same time to join the intervener, a competitor of the plaintiff's which was establishing an office in Malaysia;

(b) they would have known that the intervener had approached them to join it due to their decades of experience in the logistics market under the plaintiff's employ;

(c) they would also have known that the plaintiff's confidential information would have given the intervener a leg-up to commence its operations in Malaysia;

(d) Patricia and Annie had clandestinely accessed and downloaded the plaintiff's confidential information onto their devices, the latter having been given access to by Sheny, and they took those devices with them to the intervener, who then took ownership of them; and

(e) as the intervener was a direct competitor of the plaintiff, they knew that the use of the plaintiff's confidential information that would give the intervener an advantage and an immediate leg-up in the local logistics market would surely damage the plaintiff.

[56] On a brief aside, having observed the demeanour of the defendants and listened to their respective testimonies in court during the trial, particularly Patricia and Annie, I find them to be generally untruthful and evasive in their answers. The same could not be said of the plaintiff's witnesses.

[57] I accordingly find that the defendants are liable to the plaintiff for the tort of conspiracy to injure the plaintiff.

Unlawful interference with trade

[58] In *H & R Johnson (Malaysia) Bhd v H &R Johnson Tiles Limited & Anor* [1995] MLJU 54; [1995] 2 CLJ 581 Zakaria Yatim J (as he then was) said:

> If one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract: *Torquay Hotel Co Ltd v Cousins & Ors* [1969] 2 Ch 106, 139 per Lord Denning MR.

[59] In the Court of Appeal decision in the *SkyWorld Development Sdn Bhd & Anor v SkyWorld Holdings Sdn Bhd & Ors* [2020] 3 MLJ 294, Kamaludin Md Said JCA said:

> We agreed with the plaintiffs' submission that once the plaintiffs have established their claim(s) for trade mark infringement and/or passing off, it is a natural consequence that the tort of unlawful interference with trade will also be made out (*Hew Chai Seng (t/a Pertiland Trading Co) v Metronic Integrated System Sdn Bhd & Anor* [2017] 7 MLJ 1 at p 15 (para 45)). The High Court has referred to the case of *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm*

Performance Audio & Car Accessories Enterprise [2009] 3 MLJ 525; [2009] 8 CLJ 130 which held that there was copyright infringement by the defendant and hence there is unlawful interference with trade and business. The corporate defendants' intention is not relevant in cases where trade mark infringement and passing off is involved (*Excelsior Pte Ltd v Excelsior Sport (S) Pte Ltd* [1986] 1 MLJ 130).

[60] In view of my earlier findings that the plaintiff has established the defendants' liability to it for breach of confidence, breach of fidelity and conspiracy to injure, I find that the plaintiff's claim against them for the tort of unlawful interference with trade is also made out.

[61] I accordingly find that the defendants are liable to the plaintiff for the tort of unlawful interference with the plaintiff's trade.

[62] In their written submissions, the defendants have taken a line of argument that all of the plaintiffs claims against them should be dismissed because the DDO was invalid and that it was invalidly executed. Included within this argument was that the DDO did not expressly state the intervener's address, the name of the supervising solicitor, and that the plaintiff did not adduce evidence of the supervising solicitors appointment.

[63] However, none of these contentions were expressly pleaded by the defendants and therefore are ignored. In any event, as some of them form part of the intervener's case against the plaintiff, they will be dealt with accordingly in that part of this judgment.

[64] Furthermore, as the defendants by their solicitor had participated in the extraction of information from the devices, and had neither applied to set aside nor appealed against the DDO, I find that they cannot now take issue with it.

[65] In conclusion, I allowed all of the plaintiff's claims against the defendants.

THE DEFENDANTS' COUNTERCLAIM AGAINST THE PLAINTIFF

[66] The defendants' counterclaim against the plaintiff revolve around the following allegations:

(a) that the DDO was not sought in a genuine redress but in actual fact was made with the underlying intention and ulterior motive of embarrassing the defendants in front of their colleagues at the intervener's office; and

(b) that the allegations in the statement of claim and the plaintiff's affidavit in support of its application for the DDO were defamatory of the defendants.

[67] I reject both of these arguments for several reasons. A

[68] In respect of the first allegation, it is defeated by the fact that the data and information extracted from the devices did contain the plaintiffs confidential information. A lot of it. To me this shows that that the application by the plaintiff of the delivery-up order was in pursuit of its genuine redress against the defendants for breach of confidence, breach of fidelity, conspiracy to injure, and unlawful interference with trade. B

[69] Further, the contention that the evidence extracted from the devices was inadmissible was never put to any of the plaintiff's witnesses. See *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770. C

[70] Even if the defendants had felt embarrassed in front of their colleagues at the intervener's office when the DDO was executed, in my view that does not form the basis of any cause of action by the defendants against the plaintiff. The plaintiff had duly applied for the DDO, this Court has allowed that application, and the plaintiff had acting fully within its rights in executing it. As will be seen later in this Judgment, the supervising solicitor did not act in breach of the DDO. D E

[71] Further, the very nature of an Anton Pillar order and a delivery-up order are that they are rare and, like any form of injunctive relief, the court has to be satisfied that the prerequisites for issuing them are met before any such order is made. Because they are rare, so is their execution. It is no surprise that the defendants and their colleagues may have been shocked when it was executed simply because it would have probably been something new to them too. But any feelings of embarrassment that the defendants may have felt at the time of its execution is no cause for complaint by them as the plaintiff had followed due process in obtaining it and executing it. F G

[72] Furthermore, as mentioned earlier, the defendants have not applied to set it aside or appealed against it. In *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549 at p 575, Lamin PCA said: H

> Until and unless it is set aside, the order is valid and must be obeyed. In my view, the correct position is that once an interim injunction has been granted, it must be obeyed.
>
> If the person against whom the order is made feels that the injunction order ought not to have been made for any reason, he must apply to have it set aside. Until it is set aside, he must respect and obey it. I

[73] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance*

Bhd [1998] 1 MLJ 393, Peh Swee Chin FCJ said:

> It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filling proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank Bhd v Sahari bin Murid* ...

[74] The defendants' contentions that the allegations in the statement of claim and the plaintiff's affidavit in support of its application for the delivery-up order were defamatory of them also is no basis for any action against them. The statement of claim and the plaintiff's affidavit were filed in court and were not published.

[75] The defendants' counterclaim against the plaintiff is therefore dismissed with costs.

INTERVENER'S CLAIMS AGAINST THE PLAINTIFF

[76] The intervener's pleaded claim against the plaintiff is unnecessarily convoluted; narrating its claims in everyday terms would have been far more appropriate and advantageous. Keeping it simple should have been the order of the day, with assistance obtained from a thesaurus avoided or kept to a minimum. Phrases like 'chicanery', 'skullduggery', 'machination so Machiavellian', 'Bartimaeus', clandestine animus', 'imprimatur' are inappropriate and wholly unnecessary when simpler synonyms are available. Moreover, O 18 r 7 of the Rules of Court 2012 as applied to a plaintiff provides:

> ... every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies on for his claim ...

[77] Fortunately, the intervener's written submissions afforded a bit more clarity. From it, in essence, the intervener's allegations against the plaintiff may be summarised as follows:

(a) that the DDO was in reality an Anton Pillar order, and that the plaintiff had not satisfied the prerequisites for being granted an APO because:

(i) the intervener's address was not stated in DDO and the DDD did not specify the intervener's premises for the execution of the delivery-up order;

(ii) the supervising solicitor was not named in the DDO and therefore

did not have the authority to execute it.

(b) the supervising solicitor had unlawfully entered the intervener's premises as he did so without the intervener's consent and gained entry by a deception on the intervener's staff at the reception;

(c) by his conduct during the execution of the DDO, the supervising solicitor had exceeded his powers and authority and had acted unreasonably;

(d) the two laptops belonged to the intervener and that the supervising solicitor had illegally taken possession of them;

(e) by taking possession of the two laptops, the plaintiff had unlawfully accessed intervener's proprietary and confidential information;

(f) the plaintiff's intention for applying for the DDO was with the ulterior motive of entering the intervener's Premises and interfering with and disrupting the intervener's business;

(g) the execution of the DDO against the defendants at the intervener's Premises was therefore a trespass of the intervener's Premises, and the taking possession of the two laptops and accessing the intervener's proprietary and confidential information constituted detinue; and

(h) accordingly, the intervener seeks general, aggravated, punitive, and exemplary damages, interest of those damages, and costs from the plaintiff.

[78] in my view, all of these contentions are misconceived, more so when the intervener and the defendants failed to apply to set aside the ex parte DDO, and also failed to appeal against the inter partes order made. Their objections are akin to attempting a second bite of the cherry, which is not allowed. Nevertheless, I shall still address all of the intervener's contentions.

The DDO is not an Anton Pillar order

[79] By an Anton Pillar order, the applicant — through its authorised representative, usually a supervising solicitor — is entitled to enter into specific premises to search for and seize items and devices which are alleged to contain the data and information which the applicant seeks. While he does so, the alleged tortfeasor stands on the sidelines restrained from interfering with that search and seizure.

[80] On the other hand, by a doorstep delivery order, the applicant — through its authorised representative, usually a supervising solicitor — is entitled to turn-up at the doorstep of the respondent and receive from him the

items and devices identified in the order which are alleged to contain the data and information which the applicant seeks. The latter is clearly less intrusive.

[81] Though set out earlier in this judgment, the terms of Part A of the order covering the execution of the DDO vis a vis the recovery of the items and devices which are alleged to contain the data and information which the plaintiff sought from the defendants clearly show that it is the latter. They are reproduced below for convenience:

A. DELIVERY-UP/INJUNCTIVE RELIEF

1. An Order to compel the defendants and each of them, whether acting by themselves or through their partners, employees, servants, agents, contractors, associated companies or otherwise howsoever, to deliver up to the supervising solicitors ('Supervising Solicitor' or 'Supervising Solicitors') immediately upon service of this Order, any computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device (including any cloud or email based storage) in the possession, custody and/or power of the defendants and each of them, without turning on or off, accessing, altering, destroying, removing, transferring, or otherwise tampering with such device subsequent to the service of this Order, for the purpose of:

(a) search and/or seizure for evidence of confidential and proprietary information and/or trade secrets of the plaintiff and any material which may be used as evidence in this action as set out in Schedule A attached hereto (the 'Confidential Information');

(b) imaging of the same to preserve data integrity, which includes:-

(i) carrying out data recovery of deleted information or documents (if necessary by means of, inter alia, temporarily removing the storage disc/drive or hard disk/drive of the host device/computer/server); and/or

(ii) making digital copies of the contents of any device (including desktops, laptops and mobile phones), any form of removable or mobile media storage (including floppy disks, zip disks, flash disks, CD-ROMs, USD external hard drives and USB flash drives), cloud repositories (including cloud and e-mail accounts), computer servers (including rack mounted and tower servers) ('Digital Copies') (if necessary by means of, inter alia, temporarily removing the storage disc/drive or hard disk/drive of the host device/computer/server) and maintain the Digital Copies in a secure location to be determined by the Supervising Solicitors;

(c) conducting searches, reviews, extraction and/or to make copies of the contents of the Digital Copies by, inter alia, the following means:-

i. the carrying out or running of selective searches using search terms to locate the Confidential Information;

ii. the extraction of all Confidential Information;

iii. the processing of all Confidential Information;

iv. the digital copying of the Confidential Information;

v. the hosting of all the Confidential Information on a secure document review platform; and/or

vi. removing, retaining and/or delivering into the custody of the plaintiffs solicitors the Confidential Information (or copies thereof) for carrying into effect the purposes of this Order.

(the 'Search Process').

2. For the purposes of Order (1) above, that the defendants and each of them must immediately upon service of this Order, hand over to the Supervising Solicitors and/or its authorised representative(s) effective access to the above devices, including but not limited to doing the following:-

(a) to open and provide keys to locks;

(b) to provide all keys and passwords to extract, recover, decode and decrypt data; and

(c) to provide any other form of identification codes, passwords, passphrases, or any other such information or knowledge necessary for searching, downloading, extracting and making copies of the devices.

3. An injunction to restrain the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, until trial of this action or further Order, from using, disclosing or utilising in any way, any or all of the Confidential Information as set out in Schedule A attached hereto for any purpose or otherwise exploit the same without the plaintiffs consent;

4. An Order to compel the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, to deliver up to the supervising solicitor(s) and/or its authorised representative(s) immediately upon service of this Order, all documents and/or materials, including but not limited to those relating to the Confidential Information as set out in Schedule A attached hereto, in the possession, power, custody of the defendants or either of them;

5. That the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, do within 24 hours of the service of the order upon them, deliver or cause to be delivered, to the custody of the Supervising Solicitors, all devices, documents and/or material (save insofar as they have not already been delivered-up pursuant to this Order) required to be delivered-up under this Order.

6. That the original devices, documents, and/or materials delivered-up are to remain in the custody of the Supervising Solicitors until the completion of the Search Process, or further Order or direction of this Honourable Court.

7. The plaintiffs solicitors are to file a report to the Court on the above process;

8. That the defendants and each of them, within a period of 48 hours upon service of this Order, do respectively swear and forthwith serve Affidavit(s) upon the plaintiffs solicitors to:-

(a) confirm that all the devices, documents and/or materials required to be delivered-up under this Order have been so delivered-up, and if not, their whereabouts or what has happened to the same; and

(b) set out the name and addresses of all the persons (including any individuals, firms or companies) to whom the defendants have used, supplied, offered to supply, or otherwise howsoever delivered, the Confidential Information or any part thereof;

9. That leave of Court be granted to the plaintiff to use the documents, materials, and/or evidence (including the Digital Copies) obtained through the execution of this Order in these proceedings or any other proceedings relating to the subject matter of the plaintiffs claims herein, as is reasonably required to assert and/or enforce the plaintiffs rights.

10. That the defendants and each of them, whether acting by themselves or through their servants or agents or any of them or otherwise howsoever, be restrained from directly or indirectly informing or notifying otherwise than for the purpose of seeking legal advice from their lawyers, any person, company or firm of the existence of these proceedings or otherwise warn any person, company or firm that proceedings have been brought against them by the plaintiff;

The intervener's premises need not be identified or stated in the DDO

[82] In my view, it was not necessary in this instance for the intervener's address to have been expressly stated in the DDO and therefore specify that it was going to be executed at the intervener's premises, The first prayer in the DDO simply required the defendants immediately upon service of the DDO wherever they may be at the time, to deliver up to the supervising solicitor any computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device in their possession, custody and/or power. Even though the Writ and the statement of claim duly identified their respective residential addresses, in my view it was only reasonable and logical that the DDO was executed at a place where it was likely that they would all be at the same time, namely, their workplace, ie the intervener's premises. Apart from proverbially 'killing three birds with one stone', it also reduced the possibility of potential loss of that confidential information. For example, had they executed the DDO first against Patricia at her residence, within seconds she could have alerted Annie and Sheny. That would have been contrary to the secretive nature of the DDO.

[83] Furthermore, the defendants may have had computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device in their possession, custody and/or power at more than one venue. Thus,

in my view, executing it at their workplace increased the likelihood of getting all of them in one go. I believe it safe and reasonable to assume that not everyone may bring their work laptop home with them, but for a surety in today's world, hardly anyone would willingly leave their mobile phone at home when going to work.

[84] In addition, if the intervener's address were specifically stated in the DDO, then the defendants could easily evade the execution of the order in a whole hosts of ways, for example, by simply not being present there at the time, or by avoiding such service, or by putting the devices out of reach by something as simple as placing the electronic device in their car. As far as electronic devices go, some may be kept in homes and some may be kept in places of work their residence. Unless a plaintiff knows exactly where the devices containing its confidential information are, it is simply not practical to mandate such an order to specify the exact address at which the device can be found. In fact, in this case, Patricia was not present at the intervener's office when the order was executed there on 10 September 2020; she was in the hospital attending to her mother. Fortunately, she subsequently delivered the electronic devices that were in her possession, custody or power to the supervising solicitor.

[85] Somewhat related to this is the intervener's allegation that the plaintiff failed to make it a party to the action, which I also regard as misconceived. A plaintiff has the prerogative to decide whom to sue and what causes of action it wants to bring.

The identity of the supervising solicitor need not be stated in a doorstep delivery order

[86] I am also of the view that it is not mandatory for the identity of the supervising solicitor to be stated in a doorstep delivery order. Albeit appointed or nominated by the applicant, ultimately in the execution of a doorstep delivery order the supervising solicitor is an officer of the court whose overriding duty it to execute that order according to its terms, and is answerable to the court if he exceeds those powers given him.

[87] Furthermore, fundamental to an application for a doorstep delivery order is speed, and the applicant's first objective would be to satisfy the provisions of O 29 r 1(2A) of the Rules of Court 2012 required of any applicant for an ex parte injunction. Specifically naming the person who is going to actually execute it is not one of those prerequisites and understandably, so in the event that specifically-named person was not able to execute the order when the plaintiff desired. Moreover, the efforts to secure the agreement of someone willing to undertake that appointment before the application is finalised and

A filed may take up precious time needed to urgently apply for and obtain the order in the first place.

[88] In addition, it is common practice for supervising solicitors to be selected from the roll of members of the Malaysian Bar. I cannot imagine or fathom a scenario of someone getting wind of a confidential doorstep delivery order just obtained getting hold of a copy of it, and then brazenly masquerading as the supervising solicitor to execute it. Unless proven otherwise, the bearer of such an order turning up at the respondent's doorstep must be presumed to be the supervising solicitor authorised by the court to execute it.

The supervising solicitor had lawfully entered the intervener's premises

[89] At the trial, evidence was adduce of the intervener's office set up, of there being a glass door that led to the reception area of the intervener's premises, and a second glass door that led to the inner working area where the intervener's employees — including the defendants — attended to their work.

[90] There is no issue of the supervising solicitor unlawfully entering the reception area of the intervener's premises as he was let in by Mandy Chan Siaw Tung, the intervener's second witness (IW2).

[91] It is entrance into the working area of the intervener's office which is really in issue. IW2 testified that she saw the supervising solicitor and two others (solicitors with the plaintiff's firm of solicitors) at the first glass door, and that the supervising solicitor deceptively informed her that he was there with agreements for the defendants to sign. The supervising solicitor denies this.

[92] In my view, even if what IW2 alleged was true, that did not invalidate the DDO or make the supervising solicitor's attendance at the intervener's inner premises unlawful or a trespass.

[93] Firstly, the terms of the DDO only required the supervising solicitor to serve a copy of the DDO on the defendants and inform the defendants of its terms. None of them denied that he did. This also means that he was not obliged to either give a copy of the DDO to anyone else — including IW2 — or inform her of it and its terms.

[94] Secondly, in the scenario of seeking to serve the defendants who were not at the reception area but in the inner working area with a delivery up order in order to enforce it, I believe it to be reasonable and acceptable for a supervising solicitor to do so under a guise. Had he informed IW2 of his true intent and purpose for being there and given her a copy of the DDO to pass it

on to the defendants inside, that may have increased the possibility of potential loss of that confidential information. They could have refused to come out and deleted that confidential information. His first object was to serve the DDO on them for them to comply with it. As it is, whatever he did say to IW2 resulted in Annie and Sheny coming out so that he could serve the DDO on them.

The supervising solicitor did not exceed his powers and authority under the DDO

[95] To address this issue, the first step would be to set out what the defendants were compelled to do and were not allowed to do under the DDO.

[96] In respect of what they were compelled to do, the defendants were immediately upon service of the DDO required to deliver up to the supervising solicitor any computers, laptops, notebooks, tablets, mobile phones, and any other digital or optical storage device in their possession, custody and/or power without turning on or off, accessing, altering, destroying, removing, transferring, or otherwise tampering with such device, and grant the supervising solicitor access the contents of those devices.

[97] As to what were not allowed to do under the DDO, prayer 10 restrained them from directly or indirectly informing or notifying otherwise than for the purpose of seeking legal advice from their lawyers, any person, company or firm of the existence of these proceedings or otherwise warn any person, company or firm that proceedings have been brought against them by the plaintiff.

[98] It is from these terms that the authority, powers and duties of the supervising solicitor can be inferred.

[99] Evidence was led and it is not disputed that Annie and Sheny came to the reception area where the supervising solicitor then served them with a copy of the DDO and explained it to them.

[100] Evidence was led and it is not disputed that Annie and Sheny then went through the second glass door to the inner working area of the intervener's Premises with the supervising solicitor presumably to retrieve and hand over the devices. They did not object to him following them in. However, instead of seeking legal advice from their lawyers and handing over the devices, the first thing that Annie and Sheny did was telephone their superior in China who then instructed them not to deliver up the devices to the supervising solicitor. Contacting their superior and not immediately delivering up the devices to the supervising solicitor were clear breaches of the DDO.

[101] In that scenario and in these circumstances, and given the clear terms of the DDO, I am of the view that it was perfectly acceptable for the supervising solicitor to have then tailed Annie and Sheny wherever they then went in the intervener's Premises to ensure that they complied with the DDO and did not breach it any further. There was certainly no evidence that he left either of their sides and marauded or wandered around the intervener's Premises without them. As for allegations of shouting at them, even if it were true that he had raised his voice to get them to comply, I do not see how that act itself vitiates the DDO or makes his presence at the intervener's premises unlawful.

[102] In its written submissions, the intervener submitted to the effect that the supervising solicitor should have simply stood aside, let them breach the DDO, take note of those breaches and let the plaintiff bring further proceedings to compel them to comply with it. That contention is misconceived and frankly ludicrous. A supervising solicitor tasked with enforcing a court order and taking reasonable steps to ensure the respondent complied with its terms would be reneging on his duty if he did that. Furthermore, the object of the DDO was retrieving the plaintiff's confidential information, which would likely be lost in the time that the plaintiff bring further proceedings to compel them to comply with it.

The supervising solicitor had lawfully taken possession of the two laptops

[103] Albeit that the two laptops may have belonged to the intervener, the supervising solicitor had lawfully taken possession of them because they were in Annie and Sheny's possession, custody and/or power when the supervising solicitor executed the DDO at the intervener's Premises. There was certainly no allegation that they were not or that the supervising solicitor had also taken other devices that were in the possession, custody and/or power of the intervener's other staff.

[104] Further, the terms of the DDO did not expressly require the supervising solicitor to taken possession of devices that belonged to the defendants or inquire into who actually owned them before taking delivery and possession of them. The DDO was clear that the defendants were to deliver-up all such devices in their possession, custody and/or power.

[105] As the other allegations involve the plaintiff and not the supervising solicitor, before addressing them I would like to take the opportunity to make the following observations and comments.

[106] Given that it is wholly reasonable and understandable to expect that the execution of an APO/DDO will be met with strong resistance, then the other side of that coin is that the task of the supervising solicitor to execute it will

correspondingly be difficult. Unlike, say, the execution of a writ of seizure and sale where a uniformed court bailiff who would have court insignia on his attire when he executes it, the supervising solicitor in his/her office attire would not enjoy the same visual authority. Their task is to serve the order on an unwilling and highly-resisting defendant(s) and ensure to the best of their ability in the circumstances they face that it is complied with.

[107] Given that scenario, in my view it would be unreasonable to place a supervising solicitor's conduct in the execution of the APO/DO, his every utterance and his every movement, under microscopic scrutiny, I am not for one moment suggesting that a supervising solicitor has *carte blanche* authority to do anything he or she wants; all I am saying is that context is important. That context includes the behavior, resistance and obstinance that the defendants display, and the interplay of the surroundings. In that context, if the supervising solicitor's explanation for his conduct was objective and reasonable in the circumstances, then the court will not fault him.

[108] The supervising solicitor's function and role in the execution of an APO/DO is hard enough as it is. To subject the supervising solicitor's conduct in the execution of the APO/DO, his every utterance and his every movement to microscopic scrutiny will simply deter anyone from agreeing to such a crucial appointment to carry out what would be a thankless task.

[109] The supervising solicitor duly submitted his report on the execution of the DDO and also testified in court at the trial. I found him to be a truthful witness and accepted his evidence as the truth.

[110] Based on his report and his evidence, I find that the execution of the DDO at the interveners office as well as the conduct of the supervising solicitor in doing so to be reasonable and acceptable and within the terms of the DDO.

The plaintiff did not unlawfully access the intervener's proprietary and confidential information

[111] There was no evidence that the plaintiff had not complied with the terms of the DDO for extraction of the data and information downloaded from the devices. In fact, the extraction had involved search terms which the defendants' Solicitors had agreed to and there is no allegation that the plaintiff had done otherwise. This allegation also fails.

There was no ulterior motive behind the DDO

[112] I find that this allegation is also misconceived. As I had stated earlier, the DDO ultimately revealed a significant amount of the plaintiff's confidential information extracted from the devices.

No trespass, no detinue, and no damages

[113] In these circumstances, I find that the intervener's claim for damages for trespass, detinue etc all fail.

No unlawful interference with the intervener's trade

[114] In para [106] of her judgment in *Ly Furniture Sdn Bhd & Anor v Lifestyle Enterprise, Inc & Anor and another appeal* [2015] MLJU 2347, Nallini Pathmanathan JCA (now FCJ) said:

> In *Leo Pharmaceutical Products Ltd A/S v Kotra Pharma (M) Sdn Bhd (No 2)* (above), Low Hop Bing JCA set out the essential elements that had to be established by the defendant who had pleaded this tort by way of counterclaim:
>
> (a) that the plaintiff had interfered with the defendants trade or business;
>
> (b) that the plaintiff had used unlawful means;
>
> (c) that the plaintiff's intention was to injure the defendant; and
>
> (d) the defendant has actually been injured by the plaintiff.

[115] In para [111] of her judgment, Her Ladyship then went on to clarify what is meant by 'unlawful means'. She said:

> The significance of the presence of the element of unlawful means in establishing this tort was discussed comprehensively by Lord Nicholls of Birkenhead in *OBG Ltd v Allan* [2007] UKHL 21 where he held as follows:
>
> > Interference with the claimants business by unlawful means I start with the tort comprising interference with a trade or business by unlawful means or, more shortly, the tort of unlawful interference. The gist of this tort is intentionally damaging anothers business by unlawful means. Intention is an essential ingredient. The tort is not one of strict liability for harm inflicted on another's business, nor is it a tort based on negligence. The defendant must have intended to inflict the harm of which complaint is made. That is the starting point. I shall have to return to this point later.
> >
> > But intent to harm is not enough. Intentional harm of another's business is not of itself tortious. Competition between businesses regularly involves such business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition.

Unlawful means

This is not to say that in this field of economic rivalry anything goes. Business people are not free to promote their businesses at the expense of others by whatever means they may choose. There are limits. The common law has long recognised that some forms of conduct, intentionally damaging other traders are not acceptable ...

For these reasons I accept the approach of Lord Reid and Lord Devlin and prefer the wider interpretation of 'unlawful means'. In this context the expression 'unlawful means' embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.

[116] Here, the DDO was not unlawful. To the contrary, it is recognised as a legitimate means of recovering confidential information suspected to be in the hands of those not authorised or wrongfully possessing it. In fact, here it resulted in discovery and recovery of a significant amount of the plaintiff's confidential information located within the devices.

[117] To avoid any confusion or doubt and to be clear, even if the execution of the DDO amounted to naught and did not yield any of the plaintiff's confidential information from within the devices, it would still not have been an illegitimate exercise. After all, a DDO is not a self-help remedy but one that goes through the court's stringent approval process. If it is subsequently found by the court that the DDO should not have been issued, then the defendants remedy would have been to enforce the plaintiffs undertaking as to damages when the DDO is set aside.

[118] Accordingly, I dismiss the intervener's entire action against the plaintiff with costs. The higher costs ordered against the intervener reflects the court's view of the frivolity of the intervener's claim against the plaintiff.

ORDERS

[119] Based on the foregoing, I make the following judgment/orders:

(1) the plaintiff's claims against all of the defendants for breach of confidence, breach of duty of fidelity, conspiracy to injure, and unlawful interference with trade, are allowed with costs;

(2) an order to restrain the defendants, whether by themselves or through their directors, officers, servants, agents, or otherwise howsoever, from disclosing, retaining, or utilising in any way, any or all of the confidential information and/or trade secrets of the plaintiff as defined in Schedule A hereto ('confidential information');

A (3) an order that the defendants, whether by themselves or through their directors, officers, servants, agents, or otherwise howsoever, upon oath, deliver up all of the confidential information in any form whatsoever in their possession, custody, and/or power immediately from the date of service of this order upon the defendants or their solicitors, to the B plaintiff and/or its authorised representatives or agents at a venue to be advised by the plaintiff;

(4) within 30 days from the date or this order or the exhaustion of all ensuing appeals arising from the underlying action whichever is earlier:

C (a) all confidential information of the plaintiff and the intervener retained by the parties' counsel, solicitors and their clerical staff shall be completely and permanently deleted and shall not be retained or be kept in their possession;

D (b) all confidential information of the plaintiff and the intervener filed or submitted to court shall be handed over to the plaintiff's and intervener's solicitors respectively to be completely and permanently destroyed or deleted; and

E (c) copies of scanned documents and files retained by the supervising solicitor for the purposes of this suit shall be completely and permanently deleted.

(5) an inquiry into damages, or, at the plaintiffs sole discretion, an account of profits secured by the defendants for the benefit of any party other than F the plaintiff by use of the confidential information;

(6) an order for discovery of all relevant documents including but not limited to invoices, delivery orders and audited sales records to be furnished by the defendants to the plaintiff within seven days from the date of G judgment for the purpose of assisting the plaintiff to make an election of the remedies set out in para (3) above;

(7) all further proper accounts, inquiries, and directions;

(8) general, aggravated, and/or exemplary damages to be assessed; H

(9) interest on all sums found due and payable by the defendants under s 11 of the Civil Law Act 1956 at the rate of 5% per annum from the date of this writ until full payment (or at such rate and such period of time as deemed fit by this honourable;

I (10) the defendants counterclaim against the plaintiff for damages for defamation is dismissed with costs;

(11) the intervener's claims against the plaintiff for trespass, detinue, and unlawful interference with trade are dismissed with costs;

(12) each of the defendants and the intervener do pay costs of RM60,000 to the plaintiff, subject to allocator; and

(13) the intervener do pay costs of RM80,000 to the plaintiff, subject to allocator.

Order accordingly.

Reported by Ashok Kumar